

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FINJAN, INC.,

Plaintiff,

v.

CISCO SYSTEMS INC.,

Defendant.

Case No. 17-cv-00072-BLF (SVK)

**ORDER ON JOINT DISCOVERY
LETTER BRIEF RE EXPERT
DEPOSITIONS OF DRs.
MITZENMACHER, JAEGER, AND
ORSO**

Re: Dkt. No. 350

Before the Court is the parties' joint discovery letter brief regarding disputes that have arisen in connection with Defendant Cisco Systems, Inc.'s depositions of certain expert witnesses for Plaintiff Finjan, Inc. Dkt. 350. Specifically, the parties disagree about (1) whether Cisco may have more than one attorney ask questions at the depositions of Drs. Mitzenmacher, Jaeger, and Orso; (2) whether Finjan must make Dr. Mitzenmacher available to continue his deposition following Finjan's termination of the deposition before the seven-hour limit was reached; and (3) whether Finjan should be ordered to pay Cisco's costs and fees associated with the discovery letter and the continued deposition of Dr. Mitzenmacher. *Id.* Pursuant to Civil Local Rule 7-1(b), the Court deems this matter suitable for determination without oral argument. For the reasons discussed below, the Court orders that (1) only one attorney for Cisco shall conduct the deposition of each Finjan expert, unless the parties agree otherwise; (2) Finjan shall make Dr. Mitzenmacher available to continue his deposition by the same Cisco attorney who questioned him at his initial deposition until the time limit of seven hours is reached; and (3) Cisco's request for sanctions is denied.

1. Deposition questioning by more than one attorney

Cisco argues that it should be permitted to have two attorneys ask questions at the depositions of Drs. Mitzenmacher, Jaeger, and Orso. The parties' submission indicates that Dr. Mitzenmacher prepared a 2,000-page expert report (not including exhibits) concerning

1 infringement of the '780 and '154 patents, and Drs. Jaeger and Orso prepared expert reports on
2 validity. Cisco claims that the '780 and '154 patents are unrelated, and Cisco had different
3 attorneys handle those patents and different experts address the patents in rebuttal reports.
4 According to Cisco, it is "not aware of any case law or rule preventing questioning by two
5 attorneys under this circumstance, nor is there a prohibition in any standing Order applicable to
6 this case." Dkt. 350 at 2. Cisco notes that Finjan agreed to allow Cisco to have two attorneys
7 question a different expert, Dr. Medvidovic.

8 Finjan argues that it is customary in this District for judges to require a single attorney to
9 question a witness at trial. According to Finjan, the parties have followed that procedure in 45
10 depositions taken in this case. Finjan notes that Cisco did not inform Finjan of the plan to have
11 two Cisco attorneys question Dr. Mitzenmacher until 6:50 p.m. on the night before the deposition,
12 even though Cisco had Dr. Mitzenmacher's expert report for more than a month before the
13 deposition. Finjan also disagrees with Cisco's contention that the circumstances here warrant
14 using two attorneys at deposition. The parties stipulated to a single deposition on each issue, such
15 as infringement and validity. Finjan also argues that Cisco is being inconsistent because Cisco
16 used a single attorney to question Dr. Cole, an expert who opined on infringement of two different
17 patents in a 1,700 page report, where the patents were related, but wants to have multiple attorneys
18 question Dr. Jaeger, whose validity opinion relates to three related patents. Finjan argues that it
19 permitted Cisco to have two attorneys question the other expert discussed in Cisco's portion of the
20 brief, Dr. Medvidovic, because he had submitted a report that covered two issues: (1) a tutorial on
all Asserted Patents, and (2) an opinion regarding infringement of the '633 patent.

21 Having considered the parties' arguments, the Court will not permit two Cisco attorneys to
22 question Drs. Mitzenmacher, Jaeger, and Orso absent agreement of the parties. Although Cisco is
23 correct that there is no written rule categorically prohibiting deposition questioning by more than
24 one attorney, it is the typical practice in this District for only one attorney to question a witness at
25 deposition. The parties both at least tacitly acknowledge this practice and appear to have followed
26 it, with the exception of Finjan's agreement to permit Dr. Medvidovic to be questioned by two
27 Cisco attorneys. Circumstances may warrant allowing more than one attorney to ask questions at
28 a deposition, such as where the witness is being deposed on clearly distinct claims. *See, e.g.,*

1 *Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc.*, 712 F.2d 1324, 1325 (9th Cir. 1983) (holding
2 that it was “not a per se abuse” to have two attorneys question a fact witness being deposed in
3 connection with both state and federal actions). However, the distinction between issues is not so
4 clear in this case, or in patent cases in general, and a rule that multi-attorney questioning is
5 permitted on “unrelated” patents is likely to instigate more disputes than it resolves.

6 Furthermore, Cisco apparently did not inform Finjan of its intention to have more than one
7 attorney question Dr. Mitzenmacher until the night before the deposition. This strategy led to the
8 suspension of Dr. Mitzenmacher’s deposition and the filing of the discovery brief now before the
9 Court. The far better approach is for parties who believe that a case warrants departure from the
10 general practice of single-attorney questioning to discuss that issue during the Rule 16 or Rule 26
11 conferences and, if necessary, raise the issue with the Court sufficiently in advance of the
12 deposition to permit for an orderly resolution of the issue. *See generally* Fed. R. Civ. P.
13 16(c)(2)(L) (identifying as an appropriate topic for any pretrial conference “adopting special
14 procedures for managing potentially difficult or protracted actions that may involve complex
15 issues, multiple parties, difficult legal questions, or unusual proof problems”); Fed. R. Civ. P.
16 26(f) (requiring parties to confer on a proposed discovery plan); Standing Order for All Judges of
17 the Northern District of California re Contents of Joint Case Management Statement (requiring
18 parties to include in their joint case management statement “any proposed limitations or
19 modifications of the discovery rules,” “a proposed discovery plan pursuant to Fed. R. Civ. P.
20 26(f),” and “any identified discovery disputes.”).

21 In light of the facts and circumstances of this case, the Court will not permit Cisco to have
22 more than one attorney question Drs. Mitzenmacher, Jaeger, and Orso at deposition absent an
23 agreement by the parties.

24 **2. Continued deposition of Dr. Mitzenmacher**

25 Dr. Mitzenmacher had been deposed for under seven hours when Finjan terminated the
26 deposition in light of the dispute over whether a second Cisco attorney would be permitted to
27 question him. The Court denies Finjan’s request to forego the continued deposition of
28 Dr. Mitzenmacher. Finjan must make Dr. Mitzenmacher available before the close of expert
discovery to complete his deposition by the Cisco attorney who conducted the initial deposition

1 for whatever portion of the seven-hour limit remains.

2 **3. Request for sanctions**

3 Cisco requests that the Court exercise its authority under Rule 37 and its inherent power to
4 sanction Finjan by ordering it to pay the fees and costs incurred in connection with this discovery
5 letter brief and the continued deposition of Dr. Mitzenmacher. In light of the Court's ruling and
6 considering the other facts and circumstances giving rise to the current dispute, the request for
7 sanctions is denied.

8 **SO ORDERED.**

9 Dated: September 9, 2019

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12 SUSAN VAN KEULEN
13 United States Magistrate Judge
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